

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44293
Docket No. MW- 43562
20-3-NRAB-00003-200437**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Lepke Trucking) to perform Maintenance of Way and Structures Department work (hauling rock for the crossover pads at Mile Post 278) on the Aurora Subdivision, Chicago Division on December 12, 13, 14, 15, 16, 17 and 18, 2014 (System File C-15-C100-40/10-15-0092 BNR).**
- (2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with the Carrier’s intent to contract out this work or to make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants H. Harmon, C. Rice, J. Vinyard, D. Newton, J. Mudd, M. Luther, C. Montgomery, J. Gibb, T. Flynn and D. Easley shall now each be compensated for forty (40) hours at their respective straight time rates of pay and for thirty-seven (37) hours at their respective overtime rates of pay.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This claim concerns the Carrier's assignment of outside contractors (Lepke Trucking) to haul rock for the crossover pads at Mile Post 278 on the Aurora Subdivision, Chicago Division on December 12, 13, 14, 15, 16, 17 and 18, 2014. The Claimants have established and hold seniority within the Carrier's Maintenance of Way Department.

The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Organization contends that the work of hauling rock is typical Maintenance of Way work, which has customarily and historically been assigned to and performed by the Carrier's Maintenance of Way forces. Inasmuch as the hauling of rock was in connection with the construction and maintenance or repairs of structures or facilities located on the right of way, the Organization contends that there can be no question that the instant work is customarily performed by Maintenance of Way forces and is reserved to them by clear agreement language.

The Organization contends that the notice that the Carrier asserts that it provided to the General Chairman of its decision to assign outside forces to perform this work was insufficient to satisfy its obligations under the parties' Agreement. The Organization contends that the Carrier may only assign its work to outside contractors under certain specified conditions and after notice to and conferencing

with the Organization. The Organization contends that the Carrier has failed to prove that it did not possess the “specialized equipment” required for the work and thus, did not meet one of the exceptions under the Note to Rule 55.

The Carrier contends that the Organization has failed to prove that the claimed work occurred. Furthermore, the Carrier contends, the Organization has failed to show that this work has been exclusively assigned to its members, system-wide.

The Carrier contends that its notices, dated September 24, 2014 and January 13, 2015, provided sufficient notice of its intention to contract out this work, and that the work required “special equipment and special skills.” The Carrier contends that the Organization has failed to prove its claim that no specialized equipment was utilized by the contractor in performing the disputed work. The Carrier further contends that the Organization failed to show that the Claimants possess the necessary skills to utilize whatever specialized tools were required.

Although the Carrier asserts that the Organization failed to prove that the work took place as alleged, the Organization has provided sufficient proof that the contractors performed the work of hauling rock for the crossover pads at Mile Post 278 on the Aurora Subdivision, Chicago Division. Contrary to the Carrier’s assertion, it is well established that the contractual standard under this Agreement is whether this work is customarily performed by the BMWED’s members and the Organization need not show that it has performed this work “exclusively.”

Prior Board decisions confirm that hauling of rock is customarily and historically performed by the Carrier’s forces. See, *e.g.*, Third Division Award 10558; Third Division Award 43282. Although there are Board decisions that distinguish hauling rock by contractors on an FOB contract, there is insufficient evidence on this record to show that the contractors were making an initial delivery of rock to the work site, rather than moving the rock from one Carrier site to another. See, *e.g.*, Third Division Award 43700. Furthermore, the Carrier provided no evidence to support such a conclusion. Therefore, the Board finds that this hauling of rock was quintessential Maintenance of Way work.

Accordingly, the Carrier could only contract out the work under certain stated exceptions. The Note to Rule 55 in the parties’ Agreement provides,

“However, such work may only be contracted provided that special skills not possessed by the Company’s employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company’s forces.”

If the Carrier intends to contract out the work based on one of these exceptions, it must give notice to the General Chairman “as far in advance of the date of the contracting transaction as practicable and in any event not less than fifteen (15) days prior thereto...”

The Carrier points to two contracting notices, stating that they were sufficient to provide the contractually required notice. The second one is dated January 13, 2015, which is after the claimed work, so it cannot serve as notice. The first notice, dated, September 24, 2014, states,

“As information, BNSF advised be letter dated July 11, 2014 of its plans to expand capacity with the extension of existing sidings and crossovers to improve velocity between MP 113 to MP 117 (Carter) and MP 122 to MP 126 (Milledgville) on the Aurora Sub-Division, and MP 307 on the St. Croix Sub-Division. That earlier letter is hereby amended to include the additional dirt work required to install a second crossover near MP 307 on the St. Croix Sub-division. BNSF is not adequately equipped with the necessary specialized equipment, such as scrapers, graders, rollers, compactors, dozers, loaders, blades, off-track cranes, as well as front-end loaders, dump trucks, water trucks, and track-hoes (excavators) necessary to perform this volume of dirt work. Moreover, BNSF forces do not possess the necessary specialized dirt work skills for projects of this size and type. The work to be contracted includes, but is not limited to, install necessary erosion-control measures; necessary clear/ grub existing material; install/ grade/ build-up temporary construction crossings/access roads; excavate approx. 700 c.y. of existing material; excavate/grade/build-up/compact approx. 410 c.y. of new embankments, turnout and signal berms; furnish/unload/compact approx. 875 c.y. new

sub-ballast material; install necessary utility lines; necessary mulch and over-seeding; necessary assistance relocating/unloading/placement of track and turnout components; and debris removal.

It is anticipated that this project will begin on approximately October 15, 2014 and continue through remainder of the year, weather permitting. However, some Signal or utility work may begin sooner.”

Once the Organization has proven that the disputed work is customarily done by its members, the Carrier bears the burden of proving that its notice was sufficient and that one of the exceptions applies. Third Division Award 43962. Here, although the Carrier asserts that it was inadequately equipped to handle a project of this magnitude, the disputed work is the hauling of rock for the crossover pads at Mile Post 278 on the Aurora Subdivision. This work is not mentioned in the September 2014 notice and does not appear to be part of the large-scale project contemplated by the notice. Thus, the Carrier has not shown that it provided proper notice of the work or that one of the exceptions applied to the claimed work. As a result, the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of October 2020.